82-959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CASE NO. _____

STATE OF FLORIDA,

Petitioner,

-vs-

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
FLORIDA'S FIRST DISTRICT COURT OF APPEAL

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
COUNSEL OF RECORD

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, Florida 32301
(904) 488-0600

QUESTION PRESENTED

I.

WHETHER THE LOWER COURT CORRECTLY FOUND THAT THE OPEN FIELDS DOCTRINE DID NOT APPLY TO MARIJUANA FOUND GROWING IN AN OPEN FIELD APPROXIMATELY FIFTY YARDS FROM A DEFENDANT'S RESIDENCE?

II.

WHETHER THE LOWER COURT CORRECTLY REFUSED TO APPLY A GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT?

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd

TABLE OF CITATIONS (cont'd)

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

STATE OF FLORIDA,

Petitioner,

-vs-

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO FLORIDA'S FIRST DISTRICT
COURT OF APPEAL

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of Florida's First District Court of Appeal in this case.

OPINION BELOW

The official opinion of Florida's First District Court of Appeal is reported as Kilpatrick v. State, 403 So.2d 1104 (Fla. 1st DCA 1981).

JURISDICTIONAL STATEMENT

The judgment of Florida's First District Court of Appeal was rendered September 17, 1981 (A-1). Discretionary review was sought in the Supreme Court of Florida, and that court entered an order staying all proceedings and tolling the time for all further proceedings pending disposition of the State's petition for review (A-23). On September 14, 1982, discretionary review was denied (A-25), and rehearing was denied on November 9, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3) because the lower court has decided a substantial

federal question in a manner contrary to applicable decisions of this Court as well as several federal courts of appeal. The opinion upon which review is sought became final after the Florida Supreme Court refused to exercise discretionary review when rehearing was denied on November 9, 1982. See Banks v. California, 395 U.S. 708 (1969), which stands for the proposition that this Court will not exercise its discretionary certiorari jurisdiction unless the petitioner first attempts to obtain discretionary review in the state's highest court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Federal Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Federal Constitution provides in pertinent part that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents Ken and Cherie Kilpatrick (husband and wife) were charged by the State Attorney of Jackson County, Florida, with the offenses of possession of narcotic paraphernalia and possession of controlled substances contrary to Florida's drug laws. Prior to trial, a motion to suppress was filed in which the Respondents alleged that their rights guaranteed them by the Fourth Amendment to the United States Constitution and Article I Section XII of the Florida Constitution had been violated.[1] After an evidentiary hearing,

---

[1] Florida's appellate courts have concluded that the search and seizure provision of the Florida Constitution is identical to that of the Fourth Amendment to the United States Constitution. State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979), approved, 387 So.2d 963 (Fla. 1980). In any event, the lower court's opinion was based only on the Fourth Amendment and defense counsel cited Wong Sun v. United States, 371 U.S. 471 (1963).

the trial court denied the motion to suppress, and both Respondents pled nolo contendere while reserving their right to appeal the trial court's denial of their motion to suppress.

At the evidentiary hearing, the State presented the testimony of Officer Ron Steverson of the Sneads, Florida, Police Department. The officer testified that he had received a tip from an informant that marijuana plants were growing on Respondent's Ken Kilpatrick's father's farm. Because the tip was not sufficient to allow him to obtain a search warrant, the officer decided to contact Respondent's father, whom he knew personally, to ask him about the marijuana. The officer drove down a county maintained road until he came upon a road turning off into Respondent's father's farm. The officer testified that he did not know where Respondent's father

lived and he proceeded down a long dirt road approximately one-half mile until he rounded a bend and saw several tall marijuana plants growing in a field.[2] As he proceeded around the bend, he observed a trailer approximately forty to fifty yards from where the marijuana was growing. This trailer was leased by Respondents from Respondent Ken Kilpatrick's father.

Approximately thirty minutes later Respondent Ken Kilpatrick's father arrived and asked what was going on. Officer Steverson learned from him that the trailer belonged to Respondent Ken Kilpatrick, and the officer requested that the father

---

[2] Officer Steverson's testimony conflicts with the lower court's finding of fact that the officer saw the marijuana plants from the trailer. The officer's testimony was uncontradicted that he did not see the trailer until he rounded the bend in the road after he had already observed the marijuana plants.

telephone his son and ask him to come to the scene. When Ken Kilpatrick arrived at the scene, he was arrested and given his Miranda warnings, after which the officer requested that he be allowed to look inside the trailer. Ken Kilpatrick initially refused to allow the search of his trailer, but the father interceded and persuaded his son to cooperate with the police. Respondent Ken Kilpatrick subsequently signed a consent to search form which was introduced into evidence without objection. A search of the trailer subsequently revealed narcotics and narcotic paraphernalia prohibited by Florida's drug laws.

During argument on the motion to suppress, the prosecutor first argued that Respondent Ken Kilpatrick had no standing to contest the legality of the search because the search took place on land owned

by Respondent Ken Kilpatrick's father. The prosecutor then quoted at length from Justice Holmes' opinion in Hester v. United States, 265 U.S. 57 (1924), for the proposition that the Fourth Amendment's protection afforded to people in their persons, houses, papers, and effects was not extended to open fields.

Respondents' lawyer countered with the argument that because the police officer was a trespasser, he had no right to be on the property and that anything discovered in plain view by the police officer was suppressible as fruit of the poisonous tree. He claimed that because the initial search was illegal, the subsequent search of the trailer was also illegal. He did not address the State's open fields argument.

The trial court orally denied the motion to suppress. On appeal, the State

again argued that Respondents lacked standing to raise the legality of the search of someone else's property. The State also argued that Respondents' plain view argument was inapplicable because the case was controlled by the open fields doctrine of Hester, supra. The State argued in the alternative that the search should be upheld under a good faith exception to the Exclusionary Rule.

In a written opinion, Florida's First District Court of Appeal reversed and ordered that the fruits of the search be suppressed. This opinion has been reproduced in its entirety in the appendix to this petition (A-1). The State filed a Motion for Rehearing En Banc, also reproduced in the Appendix (A-8), again relying upon Hester, supra and also relying upon Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974),

a more recent open fields case. This motion was unsuccessful and subsequent discretionary review was denied by the Supreme Court of Florida.

REASONS WHY THE WRIT SHOULD BE GRANTED

ARGUMENT

I. THE LOWER COURT INCORRECTLY REFUSED TO RELY UPON THE OPEN FIELDS DOCTRINE OF HESTER V. UNITED STATES.

The lower court reversed the trial court's denial of Respondents' Motion to Suppress on the rationale that since the officer was trespassing, he had no right to be in a constitutionally protected area and that everything that was subsequently seized was inadmissible as fruit of the poisonous tree. The lower court made this determination even though the open fields doctrine of Hester v. United States, 265 U.S. 57 (1924), had been relied upon extensively both at trial and on appeal. It is significant that in Hester itself, Justice Holmes stated that even if there

had been a trespass, the search and seizure were still legal.

The lower court was apparently influenced by its erroneous conclusion that the marijuana plants were located on the curtilage of Ken Kilpatrick's leasehold interest, and therefore both Respondents had reasonable expectations of privacy in what was growing on their property.[3]

---

[3] Should there be any doubt about whether the plants were located on the curtilage of Respondents' leasehold interest, Officer Steverson testified that he was still in his automobile on the dirt road when he observed the marijuana plants in plain view before he could even see Respondents' trailer. On cross-examination by defense counsel, Officer Steverson testified that the plants were behind a dry creek bed approximately fifty yards away from the trailer. Assuming only for the sake of argument that the lower court correctly found that Respondents had standing to contest the search of property owned by Ken Kilpatrick's father, it is extremely doubtful that the lower court correctly found that the marijuana was located on the curtilage of Respondents' property. Neither Respondent introduced any evidence of the extent of the leasehold interest. (cont'd on next page)

Kilpatrick v. State, 403 So.2d 1104, 1106 (Fla. 1st DCA 1981). See Murphy v. State, 413 So.2d 1268, 1270 (Fla. 1st DCA 1982), in which the same lower court distinguished Respondents' case:

> In Kilpatrick the officer was within the curtilage of the defendants' home when he observed the marijuana. The court held that he had no right to be there and therefore the observation could not be justified under the plain view doctrine.
>
> * * *
>
> . . . the distinction between the "plain view" doctrine and the "open fields" doctrine lies in the possessor's expectation of privacy in the area observed. If an officer is in a constitutionally protected area and he has no right to be there, items which he views there may not be seized under the plain view doctrine. If, however, the area observed is not constitutionally protected,

---

The lower court apparently assumed that the area in which the marijuana plants were found was included in the leasehold interest, thus allowing both Respondents to have standing to object to the search. Kilpatrick, supra at 403 So.2d 1106.

evidence obtained pursuant to the observation may be admissible under the "open fields" doctrine.

The lower court made this distinction even though the revenue officers who testified in Hester, supra, were lying in wait on the curtilage of Hester's property when they observed the illegal moonshine whiskey. Although the lower court did not say so, it apparently concluded that this Court's opinion in Katz v. United States, 389 U.S. 347 (1967), has modified the open fields doctrine of Hester. This is the construction of the open fields doctrine currently popular in the Supreme Court of Florida. See Florida v. Brady, Case No. 81-1636, which is currently pending decision on the merits in this Court on this identical issue. See also DeMontmorency v. State, ___So.2d___ (Fla. 1982), in which the Florida Supreme Court relied upon Brady and Katz to invalidate a

warrantless search of an open field -- the Florida Supreme Court legitimized criminal activity by finding that the defendant had created (via Katz) a legitimate expectation of privacy by trying to hide her marijuana plants behind a fence and by having dogs to guard her property. Citing Hester and its open fields doctrine, the Florida Supreme Court found that the doctrine was inapplicable if the property was thoroughly enclosed.

It is significant to note that even in Katz itself, this Court cited Hester for the proposition that an open field was not a constitutionally protected area. Katz, supra at 389 U.S. 351.

It should also be noted that this Court has never retreated from the rule announced in Hester and that, in addition to citing the open fields doctrine approvingly in Katz, the Court has also cited the rule in

a number of recent decisions. See, e.g., Donovan v. Dewey, 452 U.S. 594 (1981) (Rehnquist, J., concurring); Rakas v. Illinois, 439 U.S. 128, 143, n. 12 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977); United States v. Santana, 427 U.S. 38, 42 (1976); and Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974).

In addition to the fact that the lower court's holding conflicts with the open fields doctrine approved in the previously cited cases, the lower court's opinion also conflicts with an en banc decision of the Sixth Circuit Court of Appeals. In United States v. Oliver, 686 F.2d 356 (6th Cir. 1982), cert. pending, the court of appeals sitting en banc reversed a panel decision which had found that the owner of an open field may have a fourth amendment expectation of privacy in that field and

that Hester had been impliedly overruled by Katz. The panel decision was reversed, and the Sixth Circuit specifically noted that Katz itself recognized the continuing validity of the Hester open fields doctrine.

Petitioner recognizes that the words "open fields" are not mentioned in the lower court's opinion. However, as previously asserted, the State argued the validity of the open fields doctrine both in the lower court and on appeal. The fact remains that the lower court has decided a substantial federal question in a manner directly contrary to decisions of this Court. This Court has previously recognized that when an aggrieved party properly presents the appropriate federal question both in the trial court and on appeal, the Court has jurisdiction regardless of whether the opinion sought to

be reviewed mentions the federal question. See e.g., Street v. New York, 394 U.S. 576, 582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Should there be any doubt about the presentation of the federal question both in the trial court and on direct appeal, the Court should be aware that the entire hearing on the motion to suppress has been transcribed and is part of the record on appeal. Similarly, the State's appellate brief is also available to demonstrate that the federal question was raised and rejected on direct appeal.

II. ASSUMING ARGUENDO THAT THE LOWER COURT PROPERLY REJECTED THE OPEN FIELDS DOCTRINE, THE SEIZURE OF CONTRABAND FROM THE OPEN FIELD AND THE TRAILER SHOULD BE UPHELD UNDER A GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

Assuming that the Court declines to exercise discretionary review on the open fields issue, review should still be granted on the theory of a good faith exception to the Fourth Amendment warrant requirement. This issue was rejected by the lower court although it had been squarely presented on appeal:

> Finally, the warrantless seizure of the marijuana plants should be upheld as a "good faith exception" to the warrant requirement. United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 67 L.Ed.2d 114 (1981). Contra, Walden v. State, 397 So.2d 368 (Fla. 1st DCA 1981).

(State's Answer Brief of Appellee at 14.)

Since this issue is currently pending on the merits in Illinois v. Gates, Case

No. 81-430, certiorari should be granted and the case should be held pending disposition of Illinois v. Gates, if review is not granted on the open fields issue. Keney v. New York, supra.

CONCLUSION

The lower court incorrectly refused to apply the open fields doctrine to a warrantless search of marijuana plants growing in plain view in an open field approximately fifty yards from Respondents' trailer. The lower court has apparently concluded that Katz, supra allows a criminal to manufacture an expectation of privacy in an open field even though Katz itself recognized the continuing validity of the open fields doctrine. Since this issue is presently before the Court in Florida v. Brady, supra, Petitioner respectfully requests that the Court grant

certiorari and hold the case pending resolution of Florida v. Brady. See Keney v. New York, 388 U.S. 440 (1967), which provides support for retention of a case while certiorari is pending in a similar or identical issue.

Similarly, if review is not granted on the open fields issue, the Court should grant certiorari and hold the case pending disposition of the good faith exception in Illinois v. Gates.

Respectfully submitted:

JIM SMITH
Attorney General

By:_____

LAWRENCE A. KADEN

Assistant Attorney General

THE CAPITOL, 1502

Tallahassee, FL 32301

(904) 488-0600

COUNSEL FOR PETITIONER

Ken KILPATRICK and Cherie, Kilpatrick, Appellants,

v.

STATE of Florida, Appellee.

No. AC-176

District Court of Appeal of Florida, First District,

Sept. 17, 1981

McCord, Judge.

This is an appeal from the trial court's order withholding adjudication of appellants' guilt and placing them on probation after their pleas of nolo contendere to possession of narcotic paraphernalia and possession of a controlled substance. The pleas preserved the appellants' right to appeal the trial court's denial of their motion to suppress, which the parties stipulated was dispositive of the case. We reverse. At the motion hearing, police officer Ron

Steverson testified that on August 20, 1980, he received a confidential tip that appellants had marijuana plants growing at their residence. He stated that because the tip was insufficient to support a search warrant, he proceeded to the farm of appellant Ken Kilpatrick's father Dillon Kilpatrick, on which appellants lived, to talk to Dillon, whom he knew, about the information he had received. He stated that he left the public road and entered the farm on a private road looking for Dillon's house. He passed a brick home and a trailer (the trailer was Dillon's home) without stopping to ask for directions, thinking, he explained, that Dillon lived farther back on the property. He proceeded on down the private road for about one-half mile when he came to another trailer (appellants') and saw marijuana plants growing outside the trailer. He stated

that he then went back down the road to radio another policeman, who later came to the scene, and that Dillon drove up to appellants' trailer about one-half hour later. Ken Kilpatrick arrived subsequently, and after confronting him with his discovery of the marijuana and arresting him, Steverson obtained Ken's consent to search the trailer wherein he found a pound of marijuana and drug paraphernalia.

Appellants contend that the warrantless seizure of marijuana at their trailer was not justified under the "plain view" exception to the search warrant requirement since Steverson did not make his observation from a place where he had a lawful right to be. They argue that they had a reasonable expectation of privacy at their trailer, one-half mile inside of private property, and that they were

entitled to be free from unreasonable government instrusion. We agree. Steverson, without a warrant, entered this private property where he had been told marijuana was growing to see Dillon Kilpatrick in furtherance of investigation of the tip he had received. Not knowing where Dillon's residence was located, he passed a brick house and a trailer where Dillon lived without making any inquiry but proceeded on back into the private property for about a half mile until he came to the second trailer where the marijuana was growing.

The circumstances of this case are analogous to those in State v. Morsman, 394 So.2d 409 (Fla. 1981), in which the Supreme Court held that citizens have a reasonable expectation of privacy in their backyards. There, an officer, having received information from a neighbor that

marijuana was growing in the defendant's backyard, knocked on the front door and received no answer. He then proceeded to the backyard where he saw the plants in "plain view." The court rejected the plain view argument since the plants were not visible from the street or from a neighbor's yard. Steverson's act of driving one-half mile down a private road through the private property after passing two dwellings along the way is equivalent to an officer going directly to the backyard of a house without even knocking first at the first door to make his inquiry. Steverson, under the circumstances when he arrived at the trailer, was at a place where Ken Kilpatrick had a reasonable expectation of privacy, and, therefore, his observation of the marijuana plants was the result of an

invalid search and the fruits thereof should have been suppressed.

Appellee's contention that Ken had no standing to question the validity of the search because he did not own the farm is without merit. The trailer where the marijuana was found was his residence. The cases relied upon by appellee on the standing question are cases which ruled that one does not have standing to question a search of another's residence or another's personal property. Appellant had standing to question the validity of a search of his own residence and the curtilage thereof. Compare Mixon v. State, 54 So.2d 190 (Fla. 1951).

Appellants also contend that the consent to search their trailer was not freely and voluntarily given due to the unconstitutional taint resulting from the illegal seizure of the growing plants

outside the trailer. We agree. Steverson obtained Ken's consent as a direct result of the illegal arrest which was predicated upon the fruits of the unconstitutional search. Therefore, under the facts of this case, the consent did not relieve the search of its unconstitutional taint. Bailey v. State, 310 So.2d 22 (Fla. 1975).

REVERSED.

ROBERT SMITH, Chief Judge, and MILLS, J., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEN KILPATRICK and
CHERIE KILPATRICK ,

Appellants,

-vs- CASE NO. AC-176

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING EN BANC

Comes now Appellee, the State of Florida, by and through the undersigned counsel, and pursuant to Fla.R.App.P. 9.330(c), requests the Court grant rehearing en banc in the above-styled cause. In support of this motion, Appellee states as follows:

1. In its opinion reversing the trial court's denial of Appellant's Motion to Suppress, the Court simplistically framed

the issue as an illegal search because the police officer was not in a place where he had a right to be when the contraband was seen growing in plain view. However, the State asserts that the Court overlooked the correct legal theory to be utilized with the facts of this case.

First, the Court somehow concluded that Appellants' had standing to object to the seizure of the contraband, even though the record reveals that the land upon which the marijuana plants were seized belonged to someone else (R 27,41,46). The Court apparently concluded that the contraband was found on the curtilage of Appellant's leasehold interest and cited Mixon v. State, 54 So.2d 190 (Fla. 1951), for that proposition. However, the Court's reliance on Mixon is improper. In that case, several defendants had been arrested after having been found possessing contraband in

"an empty and untenanted house." They tried to establish standing by showing that one of them had leased the house for two months. However, the Supreme Court of Florida upheld the trial court's apparent factual determination that no leasehold existed. The case never held that a defendant whose leasehold interest is merely a house trailer surrounded by land lived upon and owned by someone else can object to seizure of contraband on the land outside the leasehold interest. Has the Court apparently concluded that the curtilage of Appellants' land includes the entire property owned by Appellant Ken Kilpatrick's father?

Moreover, in Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387, 401 (1978), the United States Supreme Court emphasized that "arcane distinctions developed in property and tort law" were

not controlling when determining whether a defendant had a reasonable expectation of privacy in the area or premises searched. Yet this Court found that Appellants had a reasonable expectation of privacy in the open field surrounding their trailer even though the contraband was undisputably found on someone else's property.

However, notwithstanding the Court's conclusion that Appellants possessed standing to challenge the search of someone else's property, the Court's opinion completely overlooked the Court's own recent case of Montmorency v. State, So.2d ___, 1981 F.L.W. 1631 (Fla. 1st DCA, opinion filed July 10, 1981). Montmorency is in direct conflict with the decision in Appellants' case and was filed as supplemental authority shortly after it was decided. In that case a different panel of this Court affirmed the trial court's

denial of a motion to suppress under nearly identical facts:

> Acting on a tip that marijuana was being grown on appellant's property, two officers drove through an open gate into a pasture adjacent to appellant's property, parked their car, and crossed over a fence into a rough wooded portion of appellant's property. Prior to crossing the fence they did not see the growing marijuana, but it was seen by them after traveling a distance of some 300 feet inside the fence. From the point where the growing marijuana was found the officers could not see appellant's house trailer, which was located within the fenced property approximately 750 to 800 feet distant. After appellant was observed watering the plants she admitted it was her property, and she was arrested. At a point on adjoining property other than the place where the two officers crossed the fence it was possible to observe the growing marijuana plants from outside the fenced area. However, the officer who made this observation testified that the marijuana would not have been seen from this vantage point had not the two officers already located the marijuana on the property. (Footnote omitted).

The Court concluded that the defendant had no reasonable expectation of privacy in the marijuana which had been observed growing in an "open field" located in an area disassociated within the traditionally defined curtilage of the property. It is very significant to note that the Court recognized in a footnote that the fact that the officers were trespassing was not dispositive of the Fourth Amendment issue. See n.3 at 1981 F.L.W. 1633.

The Court also overlooked or misapprehended the State's reliance on the principle of law enunciated in State v. Belcher, 317 So.2d 842 (Fla. 2d DCA 1975). (Cited in Montmorency in n.3.) In that case, the court upheld a warrantless search and seizure after police officers had driven on to the defendant's front yard and then walked to the front porch where the defendant was sitting. The court

specifically found that the officers were not trespassers and that they had a right to go across the defendant's property to investigate the suspicious activity. The court then stated that assuming for the sake of argument the police officers were trespassers, the otherwise valid search and seizure would still be upheld.

To support that argument, the court relied upon Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed.2d 898 (1924). In Hester, the Supreme Court of the United States refused to suppress contraband seized after revenue agents observed Hester hand moonshine whiskey to another person. Although the revenue agents had entered Hester's father's property and approached Hester's father's house, the exchange of contraband occurred outside the house in an open field. The Court held that the special protection

afforded by the Fourth Amendment did not extend to open fields. The State asserts that Appellants' situation is directly on point with the decision in Hester and that the Court's conclusion that Officer Steverson's driving down the private road amounted to the functional equivalent of an invasion of Appellants' backyard is not sound. Rather, Appellants' case is more like the facts of Montmorency, supra.

Finally, the Court's opinion overlooked the rationale of the United States Supreme Court's opinion in Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). There, a state health inspector had entered the defendant's outdoor premises without the defendant corporations's knowledge or consent in order to make a pollution check of air being emitted from the corporation's

chimneys. The United States Supreme Court reversed the lower courts which had found a Fourth Amendment violation:

> The Court in Hester v. United States, 265 US 57, 68 L.Ed 898, 44 S Ct. 445, speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded. Under the Noise Control Act of 1972, 86 Stat 1234, 42 USC §§4901 et seq. (1970 ed, Supp II), [42 USCS §§4901 et seq.], an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. The invasion of privacy in either that case or the present one, if it can be said to exist, is abstract and theoretical. The EPA regulation for conducting an opacity test requires the inspector to stand at a distance equivalent to approximately two stack heights away but not more than a quarter of a mile from the base of the stack with the sun to his back with a vantage point perpendicular to the plume; and he must take at least 25 readings, recording the date at 15- to 30-second intervals. Depending upon the lay-out of the plant, the inspector may operate within or

> without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in Hester.
>
> [Citation omitted]

Id. at 416 U.S. 865, 40 L.Ed.2d 611.

2. The court has incorrectly relied upon State v. Morsman, 394 So.2d 409 (Fla. 1981). As the Court stated in its opinion, Morsman stands for the proposition that citizens have a reasonable expectation of privacy in their backyards. The court then stated that the situation involved in Appellants' case was like that involved in Morsman because Officer Steverson's act of driving one-half mile down a private road through private property amounted to the functional equivalent of an officer's going directly to the backyard of the house without even knocking first at the front door to make his inquiry. However, this conclusion by the Court jumps too far. In

fact, in Morsman the Supreme Court had clearly stated that one does not have an expectation of privacy on a front porch where salesmen or visitors may appear at any time. Id. at 409; State v. Detlefson, 335 So.2d 371 (Fla. 1st DCA 1976).

3. Moreover, the State reasserts that assuming arguendo that the seizure of the marijuana plants was illegal, the subsequent search of Appellants' trailer was permissible under the Fourth Amendment. The Court's opinion completely overlooked the United States Supreme Court's decision in Michigan v. DeFillippo, 443 U.S. 31, 40, 99 S.Ct. 2627, 61 L.Ed.2d 343, 351 (1979), in which the court upheld the use of contraband seized after an arrest was made pursuant to an ordinance which was subsequently found to be unconstitutional. Finally, Bailey v. State, 319 So.2d 22, 28 (Fla. 1975), does

not stand for the proposition that all consent given after an illegal arrest is constitutionally tainted. Rather, the Court in Bailey stated that a valid consent could be made after an illegal arrest if the circumstances were strong, clear, and convincing concerning the voluntariness of the waiver. The trial court found that Appellant Ken Kilpatrick's consent was voluntary--the record supports this conclusion, and consequently, this Court must affirm the trial court's ruling. State v. Webb, 398 So.2d 820, 826 (Fla. 1981).

In summary, Appellants failed to show that they had standing to object to the search of Ken Kilpatrick's father's land. The court erroneously concluded that Officer Steverson's conduct in driving down the private road amounted to the functional equivalent of invading Appellant's

backyard. Rather, the contraband was viewable even before Appellants' trailer could be seen (R 27). There was no reasonable expectation of privacy in the area in which the contraband was seized. Moreover, the court incorrectly concluded that Officer Steverson had no right to be in the place from which he viewed the contraband. The law in Florida is clear that a police officer has the right to approach a house in order to answer a complaint or investigate a criminal activity. State v. Belcher, supra. Finally, nothwithstanding the legality of Appellant's arrest, the record reveals that the subsequent consent to search Appellant's trailer was freely and voluntarily made. Therefore, this Court musst accept the trial court's conclusions, and the denial of the Motion to Suppress should be affirmed. State v. Webb, supra.

4. In keeping with the requirements of Fla.R.App.P. 9.330(c), I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: Montmorency v State, ___ So.2d ___, 1981 F.L.W. 1631 (Fla. 1st DCA, opinion filed July 10, 1981).

WHEREFORE, the State asserts that rehearing en banc should be granted because the court overlooked several key legal principles applicable to Appellants' case, and review by the full court is necessary to maintain uniformity among the court's opinions.

Respectfully submitted:

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Phillip J. Padovano, Esquire, P.O. Box 873, Tallahassee, FL 32302, by U.S. Mail this 24th day of September 1981.

LAWRENCE A. KADEN
OF COUNSEL

IN THE SUPREME COURT OF FLORIDA

THURSDAY, DECEMBER 17, 1981

STATE OF FLORIDA,

Petitioner,

-vs-

KEN SCOTT KILPATRICK,

Respondent.

CASE NO. 61,349
FIRST DISTRICT COURT OF APPEAL CASE NO. AC-176

Petitioner's Motion to Stay Proceedings is hereby granted and proceedings in the District Court of Appeal, First District, and in the Circuit Court of the Fourteenth Judicial Circuit in and for Jackson County, Florida, are hereby stayed pending disposition of the Petition for Review filed herein.

Petitioner's Motion to Toll Time for all further proceedings in the case until

the Court disposes of the State's request for discretionary review is granted.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM

C: Hon. Raymond E. Rhodes, Clerk
Hon. Robert L. McCrary, Jr., Judge
Hon. Duan Crews, Clerk

Lawrence A. Kaden, Esquire
Philip J. Padovano, Esquire

SUPREME COURT OF FLORIDA

No. 61,349

STATE OF FLORIDA, Petitioner,

vs.

KEN SCOTT KILPATRICK, Respondent.

[September 14, 1982]

OVERTON, J.

This cause is before the Court on the state's motion to reinstate its petition for discretionary review after an administrative dismissal on the grounds of untimely filing. The real issue is whether a motion for a rehearing en banc before a district court of appeal, which was filed separately and not in conjunction with a motion for rehearing under rule 9.330(a), has the effect of tolling time for filing a

petition for review in this Court until the district court issues its mandate. We hold that the time for petitioning this Court was not tolled because the separately filed motion for en banc review was a nonallowable motion under rule 9.331 and was in fact a nullity. As a result, the administrative dismissal was correct.

For a better understanding of the issues, we set forth chronologically the critical events in this proceeding.

On September 17, 1981, the First District Court of Appeal issued its opinion reversing the trial court.

On September 24, 1981, the state filed a motion entitled "Motion for Rehearing En Banc," in which the state, "pursuant to Fla.R.App.P. 9.330(c), requests the Court grant rehearing en banc in the above-styled cause." At the conclusion of the motion, "the State asserts that rehearing en banc

should be granted because the court overlooked several key legal principles applicable to Appellants' case, and review by the full court is necessary to maintain uniformity among the court's opinions."

On October 13, 1981, the district court of appeal issued its mandate on the opinion filed September 17, 1981.

On October 28, 1981, the state filed a notice to invoke this Court's jurisdiction on the grounds of conflict with a case previously decided by this Court.

On November 4, 1981, this Court administratively dismissed this cause because it had not been timely filed.

The state mistakenly filed its en banc rehearing motion under rule 9.330(c), the rule which pertains solely to rehearing in bond validation matters. By the motion's contents, it appears clear that the state intended the motion to be filed under rule

9.331(c), the en banc rule. Those portions of rule 9.331(c) which are pertinent to the issue in this case read as follows:

> (1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by Rule 9.330 and in conjunction with the motion for rehearing, a party may move for an en banc rehearing, solely on the ground that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.
>
> (3) Formal Order on Motion for Rehearing En Banc. An order on a motion for rehearing en banc shall be deemed denied upon a denial of rehearing or a grant of rehearing without en banc consideration. If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, and may require additional argument.

(Emphasis ours.)

The state contends that its motion as filed tolled the time for any proceedings in the district court until that motion was disposed of, citing Florida Rule of Appellate Procedure 9.300(b) and (d). The state claims that, since the motion for rehearing en banc was not specifically listed in rule 9.330(d), time for petitioning this Court for review was tolled until the district court acted by issuing its mandate.

We reject this contention because the motion as filed is nonallowable under rule 9.331(c) and requires no order or response from the district court of appeal. Rule 9.331(c) clearly states that "in conjunction with a motion for rehearing, a party may move for an en banc rehearing . .

. ." (Emphasis ours.) The rule does not provide for a separate motion for en banc rehearing.

The en banc rule, by its express provisions, does not require a district court to respond to a request for rehearing en banc. If we accepted the state's contention, however, it would mean that the district courts of appeal would be compelled to respond, even though the rule clearly states a vote will not be taken on an en banc rehearing motion unless requested by a judge.

The reasoning behind the "in conjunction with" language is the assurance that each en banc rehearing request will simultaneously be disposed of by the district court's disposition of the traditional rehearing motion and is to eliminate

separate motions for rehearing en banc. Accordingly, the state's motion for reinstatement is denied.

It is so ordered.

ALDERMAN, C.J., ADKINS, SUNDBERG and McDONALD, JJ., Concur BOYD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

First District - Case No. AC-176

Jim Smith, Attorney General and Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida,

for Petitioner

Philip J. Padovano, Tallahassee, Florida

for Respondent

IN THE SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 9, 1982

STATE OF FLORIDA,	**
Petitioner,	**CASE NO. 61,349
-vs-	**
KEN SCOTT KILPATRICK,	**District Court of Appeal, 1st
Respondent.	**District - No. AC-176

On consideration of the motion for rehearing filed by attorney for petitioner,

IT IS SO ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., OVERTON, McDONALD and EHRLICH, JJ., Concur ADKINS and BOYD, JJ., Dissent.

A True Copy

TEST:

C

cc: Hon. Raymond Rhodes, Clerk

Hon. Robert McCrary, Jr., Chief Judge
Hon. Duan Crews, Clerk

Sid J. White
Clerk Supreme Court

Lawrence A. Kaden, Esquire
Philip J. Padovano, Esquire

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,

Petitioner,

v.

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

On Petition for a Writ of Certiorari to
Florida's First District Court of Appeal

RESPONDENTS' BRIEF IN OPPOSITION

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES CONT.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-959

STATE OF FLORIDA,

Petitioner,

v.

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

On Petition for a Writ of Certiorari to
Florida's First District Court of Appeal

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Ken Kilpatrick and Cherie Kilpatrick, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of Florida's First District Court of Appeal in this case.

OPINIONS BELOW

The opinion of the District Court of Appeal (Petitioner's Appendix A-1) is reported as Kilpatrick v. State, 403 So.2d 1104 (Fla. 1st DCA 1981). The opinion of the Florida Supreme Court declining to reinstate an untimely Petition for Review in State v. Kilpatrick, ___So.2d ___, No. 61,349 (Fla. Sept. 14, 1982) is not yet reported. (Petitioner's Appendix A-25). Rehearing was

denied by the Florida Supreme Court on November 9, 1982. (Petitioner's Appendix A-33).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the decision sought to be reviewed is a decision of the "highest state court" within the meaning of 28 U.S.C. §1257.

2. Whether federal review in this Court by certiorari is precluded by the existence of an adequate and independent state ground for the decision below.

3. Whether the conclusion of the Court below that the "open fields" exception to the search warrant was inapplicable under the facts is contrary to any decision of this Court.

4. Whether the proposed "good faith" exception to the judicially-created Fourth Amendment exclusionary rule can apply to this case in view of the mandatory exclusionary rule contained in the text of the Florida Constitution at the time of the search.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article One Section Twelve of the Florida Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

STATEMENT OF THE CASE

The Respondents accept the Petitioner's Statement of the Case to the extent that it presents the course and disposition of the proceedings in the state courts. The facts of the case are stated fully in the decision of Florida's First District Court of Appeal. (Petitioner's Appendix A-1-7).

REASONS FOR DENYING THE WRIT

1. The decision sought to be reviewed is not a decision of the "highest state court" within the meaning of 28 U.S.C. §1257.

Petitioner contends that the jurisdictional requirements of Banks v. California, 395 U.S. 708 (1969) have been met. (Petition p.1,2). Presumably, the argument is that since the Florida Supreme Court dismissed a Petition for Discretionary Review the decision of the First District Court of Appeal is a decision of the "highest state court".

This is not the case, however, for the State Supreme Court did not merely decline to review the merits of the case. On the contrary, the Judgment of that Court (Petitioner's Appendix A-33) constitutes no more than a refusal to reinstate an untimely Petition for Review. The legal effect of the decision was to treat the Petition as a nullity.

The Petitioner's failure to seek timely discretionary review under the provisions of reasonable state procedural rules, and the ultimate dismissal resulting from that failure, is not at all the same as the discretionary denial of review upon the merits of a properly filed petition. In the latter case, the decision of the intermediate appeals court becomes a decision for the highest state court; in the former it does not.

The Court noted in Newman v. Gates, 204 U.S. 89 (1907) that if the state's highest court denies review for failure to comply with the requirements of a state procedural rule, "the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court". Id. at 95. So, too, in this case, the jurisdictional dismissal of the untimely petition has the same legal effect as the failure to file a petition at all.

Legal commentators have reasoned that in this setting the

requirement that state opportunities for appellate relief be exhausted becomes mingled with the independent state ground doctrine. 16 Wright FEDERAL PRAC. & PROC. §4007 (1977). This Court has made it clear on several occasions that noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal question as not properly presented to the highest state court. Michigan v. Tyler, 436 U.S. 499 (1978); Parker v. Illinois, 333 U.S. 571 (1948).

Upon these arguments the Respondents respectfully submit that the decision sought to be reviewed is not a decision of the "highest state court". The Florida Supreme Court's refusal to consider the case resulted only from the Petitioner's procedural default and not from the exercise of discretion to decline review.

2. Federal review in this Court by certiorari is precluded by the existence of an adequate and independent state ground for the decision below.

The Opinion of Florida's First District Court of Appeal (Petitioner's Appendix A-1-8) does not mention the Fourth Amendment or any other provision of the Federal Constitution. Nor did the state appeals court cite any federal decision in support of its judgment. Rather, it appears that the court relied exclusively upon Florida precedents.

Since Petitioner has conceded that the Motion to Suppress was based in part upon an alleged violation of the Florida Constitution, (Petition p.4) and since the opinion under review here did not refer to any federal issue, this Court should hold that

the decision rests upon an adequate and independent state ground. Consequently, the Court should deny the instant Petition for Writ of Certiorari.

The mere possibility that the decision may rest upon a state ground is all that is necessary to deny the relief Petitioner requests in this Court. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). That result is required even if the law supporting the state ground is the same as the federal law. Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965).

3. The conclusion of the Court below that the "open fields" exception to the search warrant was inapplicable under the facts is not contrary to any decision of this Court.

Assuming for the purpose of argument that the Court below decided a federal question at all, it did not do so in violation of any controlling precedent set by this Court. The implied rejection of the Petitioner's "open fields" argument was proper inasmuch as the facts of the case fully support the lower court's holding that the marijuana was within the curtilage of the Respondent's residence.

Petitioner has correctly noted that this Court granted certiorari in Florida v. Brady, 406 So.2d 1093 (Fla. 1981), cert. granted, 50 U.S.L.W. 3934 (U.S. May 25, 1982)(No. 81-1636) to review the holding of the Florida Supreme Court that the "open fields" doctrine set forth in United States v. Hester, 265 U.S. 57 (1924) was modified by the subsequent decision of this Court in Katz v. United States, 389 U.S. 347 (1967). However, the resolution of the issue presented in Brady, i.e., the circumstances, if any, under which an individual may create an expectation of privacy in an open field, will not have any effect upon

the outcome of this case, for the evidence presented below does not in any event establish that the marijuana was growing in an open field.

Petitioner succeeds in criticizing the lower court's conclusion that the marijuana was within the "curtilage" of the residence only by misstating the facts.[1] The officer testified that he drove 1½ miles down a private road (TR-36) upon what he knew to be a farm owned by Dillon Kilpatrick (TR-35) when he observed marijuana growing at the trailer of the Respondents Ken and Cherie Kilpatrick (TR-28,29).

The facts of this case are not at all comparable to the facts of DeMontmorency v. State, ___So.2d___, 1981 F.L.W. 1631 (Fla. 1st D.C.A. July 10, 1981) and Florida v. Brady, supra, referred to by the Petitioner. In DeMontmorency, for example, the marijuana was not only growing a "distance equal

---

[1]Petitioner contends that the officer observed the plants in plain view while still in his car before he could even observe the Respondent's trailer. (Petition p.12). This fact was drawn from a previous misstatement in the Petitioner's state court brief; it is not contained in the record. The officer testified that he was 20 to 30 yards away when he first observed three plants growing outside the trailer. (TR-28). Petitioner contends that the plants were 40 to 50 yards from the trailer (Petition p. 6) but again that is incorrect. There were some plants that far away but they were not the plants which were the subject of the observation. Those plants were actually found near a creek behind the trailer long after the officer made the original observation and long after he had gotten out of his car. (TR-37). The plants which were the subject of the initial observation were growing in a "little flower bed" on the "west end of the trailer". (TR-37).

to more than two football fields" from the house trailer, but it was apparently visible from land which was not occupied by any member of the defendant's family. Similarly, in Brady, the officers crossed private land to take up a surveillance several hundred yards from a remote airfield which was not anywhere near the defendant's residence.

The District Court of Appeal below certainly had the right to find that the marijuana plants growing on the "west end of the trailer" in a "little flower bed" (TR-37) were within the "curtilage" of the Respondent's house trailer. In spite of the Petitioner's insistence that this case should have been governed by the "open fields" exception, the facts clearly demonstrate that it was unnecessary for the courts below to even consider that. Thus, it appears tnat even if this Court were to disagree with the treatment of the "open fields" issues presented in Brady and DeMontmorency, there would be no reason to grant certiorari in this case.

In summary of these points the Respondents respectfully submit the instant Petition should be denied. The Florida courts have the right to make a factual determination that the marijuana plants were within the "curtilage" of the residence, and that the open fields doctrine was therefore inapplicable. The Petitioner has failed to demonstrate any valid reason to disturb these findings by the exercise of federal jurisdiction.

4. The proposed "good faith" exception to the judicially-created Fourth Amendment exclusionary rule cannot apply to this case in view of the mandatory exclusionary rule contained in the text of the Florida Constitution at the time of the search.

Finally, the Petitioner contends that this Court should

grant certiorari pending a decision on the merits in Illinois v. Gates, 85 Ill.2d 376, 423 N.E.2d 887 (1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982)(No. 81-430) on the issue of the proposed "good faith exception" to the exclusionary rule. Respondents respectfully submit that the resolution of that issue will have no bearing on any Florida case prior to the November, 1982 revision of Article 1 Section 12 of the Florida Constitution. The previous version of that section, which was in effect at all times material to this case, contained an explicit guarantee of the judically-created "exclusionary rule", which by its express terms required the exclusion of all illegally seized evidence.

The Federal Exclusionary Rule came about by judicial construction because the Fourth Amendment to the United States Constitution relating to unlawful searches and seizures contains no sanctions to insure its compliance. The Fourth Amendment simploy provides:

> ...the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> (U.S. Constitution Amendment IV)

Since the Federal Exclusionary rule is itself a creature of judicial construction fashioned by this Court to insure compliance with the Constitution, this Court is free to consider on a case by case basis the situations to which it applies. The analysis of policy arguments such as those presented by the Petitioner in Illinois v. Gates, may cause the Court to decline to apply the rule in certain situations. This is not the case in Florida, however.

Prior to the November, 1982 revision of Article 1, Section 12 of the Florida Constitution, the state courts were not free to consider the wisdom or lack of wisdom in applying the exclusionary rule.[2] Under the provision then in effect the exclusion of illegally seized evidence was mandated in all cases. Unlike the Federal Constitution, the state constitutional provision governing this case, does provide a remedy which must be used. Article 1, Section 12, Fla. Const. (1969) states:

> ...Searches and seizures. - The right of the people to secure in their persons, houses, papers and effects against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence. (Emphasis supplied.)

---

[2]Article 1, Section 12 of the Florida constitution was amended effective January 4, 1983. Under the new version there is no longer an explicit exclusionary rule. Instead the amendment provides:

> "This right (to be free from unreasonable searches and seizures) shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

The language "shall not be admissible in evidence" could not have been a clearer directive to the courts that illegally obtained evidence shall not be used, period. The State Constitution does not say that such evidence shall not be admitted except when the officer obtains it in "good faith" nor does it make any other exception to the rule. It simply says that such evidence shall not be admitted.

Perhaps the Fourth Amendment will ultimately be interpreted to allow for a "good faith" exception. Even if that is so, however, Respondents would be entitled to rely upon a state constitutional provision directing the exclusion, without exception, of all illegally seized evidence. States are certainly free to adopt a rule which provides a criminal defendant a greater degree of protection than that which is required as a minimum by the Federal Constitution.

For each of these reasons the Respondents contend that the decision in Illinois v. Gates, supra, will not have any effect upon this case. Since the state court decision here to exclude the evidence can be based upon an independent provision contained in the State Constitution, this Court is without jurisdiction to review the the correctness of the decision.

CONCLUSION

The Petition for Writ of Certiorari filed by the State of Florida should be denied.

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENTS

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,

Petitioner,

v.

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this Court presently in effect, Motion is hereby made that Respondents be allowed to proceed in forma pauperis. The Motion is supported by the Respondents' Affidavits attached hereto.

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENTS

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,	)
Petitioner,	)
v.	)
KEN KILPATRICK and CHERIE KILPATRICK	)
Respondents.	)

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

AFFIDAVIT IN SUPPOR OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA
COUNTY OF LEON

Before me personally appeared Cherie Kilpatrick, who being first duly sworn, deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of a Florida Supreme Court.

2. I am a citizen of the United States and a resident of the State of Florida presently residing in Jackson County, Florida.

3. I am a student at the Tallahassee Community College in Tallahassee, Florida. I am not presently employed nor am I receiving an income from any source other than employment.

4. Because of my poverty I am unable to pay the cost of preparing printed briefs in opposition to the State's Petition for Writ of Certiorari filed in this Court.

5. I have requested the preparation of a Motion for Leave to Proceed in Forma Pauperis in good faith solely for the reasons set forth in this Affidavit. I believe that the arguments made in opposition to the State's Petition for Writ of Certiorari are meritorious and for the reasons set forth more fully in the typewritten brief filed on my behalf, I believe that I am entitled to an Order denying the State's Petition.

CHERIE KILPATRICK

Sworn to and subscribed
before me this ___ day of
February, 1983.

(SEAL)

Notary Public

Commission Expires

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. 82-959

STATE OF FLORIDA,

Petitioner,

v.

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA
COUNTY OF LEON

Before me personally appeared Ken Kilpatrick, who being first duly sworn, deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of a Florida Supreme Court.

2. I am a citizen of the United States and a resident of the State of Florida presently residing in Jackson County, Florida.

3. I am a agricultural pilot who is presently unemployed and who has been unemployed since October of 1982. I am not presently receiving any income from my employment or from any other source.

4. Because of my poverty I am unable to pay the cost of preparing printed briefs in opposition to the State's Petition

for Writ of Certiorari filed in this Court.

5. I have requested the preparation of a Motion for Leave to Proceed in Forma Pauperis in good faith solely for the reasons set forth in this Affidavit. I believe that the arguments made in opposition to the State's Petition for Writ of Certiorari are meritorious and for the reasons set forth more fully in the typewritten brief filed on my behalf, I believe that I am entitled to an Order denying the State's Petition.

KEN KILPATRICK

Sworn to and subscribed
before me this ___ day of
February, 1983.

(SEAL)

Notary Public

Commission Expires

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Case No. 82-959

STATE OF FLORIDA,

Petitioner,

-vs-

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA'S FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

JIM SMITH
ATTORNEY GENERAL

RAYMOND L. MARKY
COUNSEL OF RECORD

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER

The Capitol, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT CORRECTLY FOUND THAT THE OPEN FIELDS DOCTRINE DID NOT APPLY TO MARIJUANA FOUND GROWING IN AN OPEN FIELD APPROXIMATELY FIFTY YARDS FROM A DEFENDANT'S RESIDENCE?

II.

WHETHER THE LOWER COURT CORRECTLY REFUSED TO APPLY A GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT?

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authority

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Case No. 82-959

STATE OF FLORIDA,

Petitioner,

-vs-

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

REPLY BRIEF OF PETITIONER

REASONS WHY THE WRIT SHOULD BE GRANTED

Respondents have set forth four reasons why the Writ should not be granted, and Petitioner will respond to them in order.

I.

THE DECISION SOUGHT TO BE REVIEWED IS A DECISION OF THE HIGHEST STATE COURT WITHIN THE MEANING OF 28 U.S.C. §1257(3).

Respondents have argued that the Court lacks jurisdiction because the decision upon which review is sought is not a decision of the "highest state court" within the meaning of 28 U.S.C. §1257(3). However, Florida's First District Court of Appeal is the highest state court upon which Petitioner, State of Florida, had a right in which to seek review. See Nash v. Florida Industrial Comm., 389 U.S. 235, 237, n.1 (1967), in which Justice Black recognized that where an appeal to the Supreme Court of Florida does not lie as a matter of right, a decision of a district court of appeal is the highest state court within the meaning of 28 U.S.C. §1257(3).

Moreover, Respondents have not addressed the effect of the stay granted by the Supreme Court of Florida while that court was determining whether it had jurisdiction to consider the State's Petition for Review. Therefore, because all proceedings in the state courts of Florida were stayed pending the Florida Supreme Court's determination whether to exercise jurisdiction, the Petition for Writ of Certiorari was timely filed in this Court.

II.

REVIEW IN THIS COURT IS NOT PRECLUDED BY THE EXISTENCE OF AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondents have asserted that review in this Court is precluded because their Motion to Suppress was based in part on the Florida Constitution as well as the United States Constitution. However, this

argument overlooks the fact that the search and seizure provision of the Florida Constitution has been construed by the Florida Supreme Court to be identical to the search and seizure provisions of the Fourth Amendment to the United States Constitution. See State v. Hetland, 366 So.2d 831 (Fla.2d DCA 1979), approved 387 So.2d 963 (Fla. 1980).

Moreover, notwithstanding the fact that Florida law and federal law are identical in this area, it is clear from the face of the lower court's opinion that the lower court relied exclusively upon federal law. In the lower court's opinion, Kilpatrick v. State, 403 So.2d 1104, 1105 (Fla.1st DCA 1981), the court cited the Florida Supreme Court's opinion in State v. Morsman, 394 So.2d 408 (Fla. 1981). In Morsman, the Florida Supreme Court cited Katz v. United States, 389 U.S. 347 (1967)

and held that "[t]he shortcut taken by skipping the application for a warrant was unjustified and violated defendant's Fourth Amendment right to be free from an unreasonable search and seizure." Morsman, supra, at 394 So.2d 410. Significantly, there is absolutely no mention or reliance upon Florida law in Respondents' case. See Anderson v. Harless, ___ U.S. ___, 74 L.Ed.2d 3 (1982); Oregon v. Hass, 420 U.S. 714 (1975).

Finally, the transcript of the hearing on the Motion to Suppress reveals that Respondents' same attorney cited Wong Sun v. United States, 371 U.S. 471 (1963), to support his contention that the search and seizure was illegal: "It is a very simple legal argument. It is just like the Wong Sun case, Wong Sun v. United States." Thus, there is no doubt that the opinion upon which review is sought was based

solely on the United States Constitution. Respondents' contention that the lower court's opinion rested upon an independent state ground is merely an attempt to extricate themselves from an erroneous decision which should be vacated by the Court.

III.

THE MARIJUANA PLANTS WERE GROWING IN AN OPEN FIELD AND THE "OPEN FIELDS" EXCEPTION TO THE EXCLUSIONARY RULE SHOULD HAVE BEEN APPLICABLE.

Respondents have accused Petitioner of misstating the facts in order to show that the marijuana plants were growing in an open field, when according to Respondents, the plants were growing in a flower bed by the trailer (Respondents' Brief in Opposition at 7). The record does not support Respondents' contention, however.

Assuming arguendo that it constitutionally makes a difference whether the

marijuana plants were growing in an open field adjacent to the trailer or in an open field apart from the trailer, there is no doubt in this case that the marijuana plants were seen before the officer could see the trailer. The police officer testified that "there was several, you could see before you even entered the area of the trailer, several tall growing marijuana plants, six, seven plants in plain view." (Transcript of Motion to Suppress at 6). Should there be any doubt about where the marijuana plants were growing, Petitioner respectfully suggests that the Court direct that the transcript of the hearing on the Motion to Suppress be certified to the Court.

IV.

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT WOULD APPLY IN ALL CASES IN WHICH THE ISSUE HAS BEEN PRESERVED FOR REVIEW.

Respondents' final argument is that even if the Court should adopt a good faith exception to the exclusionary rule, it would not apply in their case because of the exclusionary rule found in Florida's Constitution at the time of the search and seizure. However, this argument presupposes the fact that a good faith exception would not have been available under Florida's Constitution at the time of the search.

As stated previously, with the exception of electronic interception, Florida courts have repeatedly held that Florida's Fourth Amendment equivalent be construed identically to how the Fourth Amendment was construed by federal

courts. See State v. Hetland, supra. Therefore, since Respondents cannot dispute the fact that the issue was properly preserved for review and because there is no doubt that Florida's former Constitution could have supported a good faith exception, should the Court now adopt such an exception, it would be applicable in this case.

CONCLUSION

Because the identical issue of the applicability of the open fields exception to the warrant requirement is pending before this Court on the merits in Florida v. Brady, Case No. 81-1636, and Oliver v. United States, Case No. 82-15, Petitioner respectfully requests that the Court grant certiorari and hold the case pending resolution of the issue in those cases. In the alternative, the Court should grant

certiorari and hold the case pending disposition of the issue in Illinois v. Gates, Case No. 81-430.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

The Capitol, Suite 1502
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been forwarded to Philip J. Padovano, Esquire, Post Office Box 873, Tallahassee, Florida 32302, this _____ day of February, 1983. All parties required to be served have been served.

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER